No. 71-860

In the Supreme Court of the United States

OCTOBER TERM, 1971

RALPH TROIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

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After a trial by jury in the United States District Court for the District of Connecticut, petitioner and two co-defendants (Grasso and Pellegrino) were convicted in 1968 of violations of the Hobbs Act, 18 U.S.C. 1951, and of conspiracy to violate that Act, 18 U.S.C. 371. Petitioner was sentenced on December 9, 1968, to concurrent terms of imprisonment for twelve years and to a fine of $10,000. The conviction was affirmed on direct appeal. *United States* v. *Tropiano*, 418 F. 2d 1069 (C.A. 2), certiorari denied, 397 U.S. 1021.

On November 30, 1970, petitioner moved under 28 U.S.C. 2255 to vacate his sentence and for a new trial on the ground of newly discovered evidence. See Rule 33,

Fed. R. Crim. P. He asserted that at the trial he and co-defendant Grasso had been separately represented by different members of the same law firm; that during the trial Grasso had requested to testify that petitioner had never threatened Mr. Caron, the alleged victim of the offense; that Grasso's attorney had instructed Grasso not to testify; and that petitioner was not aware of these facts "until subsequent to conviction" (Pet. App. 9-10). The district court denied the motion on the basis of the moving papers and the record in the case (Pet. App. 10-16). It found neither prejudice nor a conflict of interest and that the proffered evidence was in any event cumulative and upon a new trial would not probably produce an acquittal. The court of appeals affirmed without opinion.

1. Petitioner contends that the refusal of counsel for co-defendant Grasso to permit Grasso to testify denied petitioner "his Sixth Amendment right to due process" (Pet. 2, 4), on the premise that there was a conflict of interest because individually retained counsel for Grasso and petitioner were from the same law firm. We note first that, as the district court pointed out (Pet. App. 13), there is nothing to indicate that each attorney was not proceeding independently or that petitioner's counsel in any way participated in the decision that Grasso not testify. In short, without any evidentiary support petitioner is attempting to transform a tactical decision independently made by a lawyer for a co-defendant into a conflict of interest.

In any event, petitioner points to nothing to show that his interest and that of Grasso diverged in this case. The substance of the evidence at trial was that

Caron had been engaged in the business of removing trash in Milford, Connecticut; and that co-defendants Grasso and Pellegrino, who were similarly engaged in business in the same area, on various occasions in the presence of each other and petitioner, made violent threats against Caron and his family, designed to compel him to curtail his competitive business. *United States* v. *Tropiano, supra,* 418 F. 2d 1069, 1072-1075. While the record further shows that petitioner also made threats at these meetings, whether he did or not is immaterial in light of his presence when co-conspirator Grasso made threats. Accordingly, the testimony petitioner claims Grasso would have given would not have relieved him of criminal responsibility. In these circumstances, even if Grasso and petitioner had been represented by the same attorney, rather than by separate counsel, there would have been no conflict. See, *e.g., Glasser* v. *United States,* 315 U.S. 60, 70; *United States* v. *Paz-Sierra,* 367 F. 2d 930 (C.A. 2), certiorari denied, 386 U.S. 935; *United States* v. *Martinez,* 428 F. 2d 86 (C.A. 6), certiorari denied, 400 U.S. 881; *Fryar* v. *United States,* 404 F. 2d 1071, 1073 (C.A. 10), certiorari denied, 395 U.S. 964. The claim of conflict is more attenuated here since these co-defendants were represented by separate counsel.

Nor is there anything to indicate that the competence of the lawyer who represented petitioner was not "within the range of competence required of attorneys representing defendants in criminal cases." *Parker* v. *North Carolina,* 397 U.S. 790, 797-798. As the district court pointed out, the firm of which petitioner's and Grasso's counsel are members "is recognized as one of

the outstanding law firms in Connecticut." *United States v. Ursini*, 296 F. Supp. 1155, 1158 (D. Conn.).

2. Furthermore the present challenge does not qualify as one based on newly discovered evidence. The unsworn motion alleges no facts to show that the evidence was in fact newly discovered—only that "movant was not aware of these facts until subsequent to conviction," which was nearly two years before the filing of the motion. No colorable showing was made of a diligent attempt to learn of the evidence and bring it to the attention of the court, even though the two defendants were engaged in business together and retained their respective attorneys from the same firm. In addition, we note that the proffered evidence that no threats were made would have been merely cumulative to testimony offered at the trial (418 F. 2d at 1073-1075).[1] Considering these circumstances together with the persuasive evidence of guilt, the determination by the trial court (Pet. App. 15) that the evidence now offered would not produce an acquittal was clearly correct.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

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[1] The defense called six witnesses who, in contradiction of Caron, testified that no threats were made by petitioner and Grasso at one of the meetings with Caron (Pet. App. 15).

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